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If the standard of care can be properly induced, the *Riley* case represents the growing trend towards a realistic viewpoint of what standard of care and skill is required of a physician and surgeon in the U.S. today. A physician today should not be required to meet only the standard set by other physicians in his locality—but should be required to have such skill as capable members of the profession ordinarily possess under similar circumstances, and one of these circumstances is his locality and the opportunities it affords for keeping abreast of advances in medical knowledge and science. Accordingly, the requirements of a physician to act as an expert witness should be similarly established.

Richard Spiwak

FAIR TRADE—VALIDITY OF DELEGATION OF LEGISLATIVE POWER TO PRIVATE PERSONS

The proponents of the fair trade laws lost another round in Pennsylvania. The Pennsylvania Supreme Court reversed a lower court, overturning one of its own previous opinions,¹ by holding invalid the non-signer provision of the fair trade law. The plaintiff manufacturer had sought to enjoin a retailer from cutting the price of the manufacturer's trademarked product, basing its case on a price maintenance contract which the plaintiff had obtained from another retailer. Under the non-signer provision,² all retailers are compelled to charge the minimum price specified in the fair trade contract, even though not parties to the contract. The court ruled that the injunction should not be issued because the non-signer provision delegates legislative power to private persons, in violation of the state constitution.³ Thus Pennsylvania became the twenty-third state to hold the non-signer provision unconstitutional.⁴

¹ *Burche Co. v. General Electric Co.*, 382 Pa. 369, 115 A.2d 361 (1955).

² Pennsylvania Fair Trade Act, PA. STAT. tit. 73, § 8 (1935): "Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section one of this act, whether the person so advertising, offering for sale, or selling is, or is not, a party to such contract, is unfair competition and is actionable at the suit of such vendor, buyer or purchaser of such commodity."

³ PA. CONST. art. II, § 1: "The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives."

⁴ See U. PA. L. REV. 539 (1961). See also *Bulova Watch Co. v. Robinson Wholesale Co.*, 252 Iowa 740, 108 N.W.2d 365 (1961); *Union Carbide and Carbon Corp. v. Skaggs Drug Center, Inc.*, 139 Mont 15, 359 P.2d 644 (1961); *American Home Products Corp. v. Benny Homsey & Assoc.*, 361 P.2d 297 (Okla. 1961); *Bulova Watch Co. v. Zale Jewelry Co.*, 371 P.2d 409 (Wyo. 1962).

Olin Mathieson Chemical Corporation v. White Cross Stores, Inc. 414 Pa. 95, 199 A. 2d 266 (1964).

This note will examine the unusual conflict of decisions which have involved the delegation of legislative power to private persons. All courts declare that legislative power may not be delegated to private persons, and although they make no attempt to justify this rule, Dr. Horst P. Ehmke has suggested that such power is based on a special trust placed in the legislature by the people.⁵ Since the people have entrusted the legislature as the body most capable of making just laws, it is a betrayal of this trust for the legislature to give law-making power to others, by whom the people have not consented to be ruled. In many cases, the courts have been asked to find that a law is invalid, as having delegated legislative power to private persons. Without examining the rationale behind the rule against delegation, the courts have not discovered any way of deciding whether there has been a delegation or not. The dispute on the non-signer provision illustrates the confusion on this issue.

The *Olin Mathieson* case follows a line of recent cases⁶ which hold the non-signer provision invalid for delegating legislative power to private persons. The reasoning of the Pennsylvania court is the same as that of other courts holding the same view. By entering into a fair trade contract, the manufacturer can compel all retailers to charge the price specified in the contract. If he makes no contract, they are not bound by any price. If he does make such a contract, it then becomes unlawful for them to charge a lower price. Since he can make unlawful what was lawful before, and can set the price which they are bound to follow, it is concluded that he has price-fixing power, thereby causing a private person to be delegated legislative power.

Other courts have held the provision valid,⁷ denying that it delegates any law-making power to the manufacturer. They use the following argument:⁸ every law applies to a certain set of facts, and a restriction is imposed when the facts arise. The non-signer provision says that when a

⁵ Ehmke, "Delegata Protestas Non Potest Delegari"—A Maxim of American Constitutional Law, 47 CORNELL L.Q. 50 (1961).

⁶ E.g., *Remington Arm Co. v. G.E.M. of St. Louis, Inc.*, 257 Minn. 562, 102 N.W.2d 528 (1960). Some courts rely on delegation as one ground for holding the provision invalid. *American Home Products Corp. v. Benny Homsey & Assoc.*, *supra* note 4; *Bulova Watch Co. v. Zale Jewelry Co.*, *supra* note 4.

⁷ *McKesson & Robbins, Inc. v. Government Employee's Dept. Store*, 211 Tenn. 494, 365 S.W.2d 890 (1963). See 109 U. PA. L. REV. 539, 540 n. 7 (1961).

⁸ *Contra*, *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936); *Sears v. Western Thrift Stores, Inc.*, 10 Wash. 2d 372, 116 P.2d 756 (1940). These cases argue that the retailer is not restricted, on the ground that he consents when he buys the product.

manufacturer enters into a price maintenance contract, it shall be unlawful for retailers to charge a lower price. In making the contract, the manufacturer is not legislating, but is only influencing a "fact" or "circumstance" which the legislature has prescribed will render price-cutting unlawful.⁹ The same argument is found in other cases concerning delegation.¹⁰

Before the fair trade cases, most cases dealing with delegation to private persons involved a majority forcing its will on a minority.¹¹ For instance, *Carter v. Carter Coal Co.*¹² held invalid a law permitting a majority of miners and mineowners to set maximum hours and minimum wages for all members of the industry.¹³ However, other cases hold that approval of the majority is just another "circumstance" or "contingency" on which the legislature may validly make a law depend.¹⁴ For instance, *Curran v. Wallace*¹⁵ held an agricultural regulation valid, though it did not become effective until approved by a two-thirds vote of the growers affected. The Supreme Court refused to find that the growers had any legislative power, saying "here it is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required favorable vote upon the referendum is one of these conditions."¹⁶

The conflict arises because of the ambiguous term "legislative power". Laws give power to many persons. A person has power to control his own property, and he can often dictate who else may use it. He has power to make lawful or unlawful the use of his own land, trademark, or patent simply by giving or withholding his consent. Thus, he may arbitrarily decide whether another's act is to be lawful. Though he has

⁹ *Scovill Mfg. Co. v. Skaggs Pay Less Drug Stores*, 45 Cal. 2d 881, 888, 291 P.2d 936, 940 (1955): "The private contracts are no more legislative in character than are other acts or conduct of private parties undertaken as a prerequisite to the application of a statute."

¹⁰ See *State ex rel. Crumpton v. Montgomery*, 177 Ala. 212, 59 So. 294 (1912), wherein the court said that every law applies to a subject, the existence of which may depend on the will of one or more, but that this does not commit the law, only its application, to those able to affect the condition. In the *Crumpton* case, a law provided that liquor could be sold in towns employing a policeman, thus allowing the town to make the sale of liquor illegal by refusing to employ a policeman. The court held that there was no delegation of power to the town.

¹¹ See DAVIS, *ADMINISTRATIVE LAW TREATISE*, § 2.14 (1958).

¹² 298 U.S. 238 (1936).

¹³ *Accord*, *DuPont v. Liquor Control Commission*, 136 Conn. 286, 71 A.2d 87 (1949); *Hollingsworth v. State Board of Barber Examiners*, 217 Ind. 373, 28 N.E.2d 64; *Wilcher v. Sharp*, 236 N.C. 308, 72 S.E.2d 662 (1952).

¹⁴ *Gannett v. Cook*, 245 Iowa 750, 61 N.W.2d 703 (1953).

¹⁵ 306 U.S. 1 (1939).

¹⁶ *Id.* at 16.

power to make unlawful what was lawful before, it is never contended that he has been given "legislative power". The courts invalidating the non-signer provision find that it gives the manufacturer power to fix the price of his trademarked good, so they declare that he has "legislative power." But they do not examine the meaning of "legislative power", and thus overlook the various powers which private persons have.

One possible view of "legislative power" might account for the different views on the non-signer provision. "Legislative power" might be the power to control the property of another, in contrast to the power to control one's own property. Courts holding the provision valid state that the trademark owner has a "property right" in the goodwill of his trademark.¹⁷ Thus, the provision is placed in the category with laws giving men arbitrary power over their own property. On the other hand, those courts invalidating the provision appear to consider that the manufacturer is permitted to dictate the use of another person's property. However, this distinction has not been stated or followed by the courts.¹⁸ Either the court declares that a person has "legislative power", or they say that the person only has power to influence a "circumstance" which brings the case under the law. The following cases illustrate that it is impossible to find any rationale in the conflicting decisions.

Several cases have dealt with laws permitting one man to dictate the use of the property of others, by requiring his "consent" or "permission" for such use. In 1887, the Illinois Supreme Court considered a law making it illegal to sell refreshments within a mile of a camp meeting without permission from those in charge. The law gives the meeting leaders the power to dictate the use of property within a mile, by giving or withholding permission, but the court rejected the claim that this gave licensing power to the meeting leaders.¹⁹ In 1891, the Kentucky Supreme Court accepted the delegation argument, and held that requiring a railroad to build a fence, if an adjoining landowner insisted, unlawfully delegated power to the landowner.²⁰ But Kentucky has since upheld laws

¹⁷ *Joseph Triner Corp. v. Neil*, 363 Ill. 559, 2 N.E.2d 929 (1936); *General Electric Co. v. Kimball Jewelers, Inc.*, 333 Mass. 665, 132 N.E.2d 652 (1956); *Corning Glass Works v. Max Dichter Co.*, 102 N.H. 505, 161 A.2d 569 (1960). The courts mention the manufacturer's "property right" while discussing whether the provision violates due process of law.

¹⁸ *Contra*, *United States v. Oregon R. & Nav. Co.*, 163 Fed. 640 (9th Cir. 1908), wherein the court rejected the claim that a law prohibiting a carrier from confining stock in transit for more than 28 hours with an extension of 8 hours if the owner of the stock consented was a delegation of legislative power to the owner of the stock.

¹⁹ *Meyers v. Baker*, 120 Ill. 567, 12 N.E. 79 (1887).

²⁰ *Ohio & N. Ry. v. Todd*, 91 Ky. 175, 15 S.W. 56 (1891); see Annot., 11 L.R.A. 285 (1891).

prohibiting the sale of liquor within 200 feet of certain private institutions without the consent of the institution,²¹ and outlawing the mining of coal within five feet of adjoining land without the consent of the adjoining landowner.²² Thus, whether it is lawful to sell liquor, or to mine coal, depends on the whim of a private person. An Ohio case²³ invalidated a law against parking at a certain point in front of a railroad station, without permission from the person in charge of the station. The property controlled is not another person's, but a public street. In 1886, a requirement that a street railroad obtain the consent of another road on the same street before operating was held not to give any legislative power to the other road.²⁴ It was called a mere condition for the right of a street railroad to operate.

Other cases resemble the fair trade cases,²⁵ in that they involve permitting a seller to control the re-sale of his property. The Ohio Appellate Court invalidated a law providing that no one could be licensed to deal in new cars without authorization of the manufacturer.²⁶ But in 1905, Washington upheld a law prohibiting the sale of tickets without a certificate from the carrier.²⁷ If the carrier issued certificates to everyone, it would be lawful for everyone to re-sell tickets. By refusing to issue certificates, the carrier could make such sales unlawful. The court held that the carrier had no legislative power.

In all of these cases, a person had an option to make another's act either lawful or unlawful. But people also have such an option when they are permitted to restrict the use of their own land or patent. They can either consent to a nuisance on their neighbor's land, or seek an

²¹ *Beacon Liquors v. Martin*, 279 Ky. 468, 131 S.W.2d 446 (1939).

²² *Whitaker v. Green River Coal Co.*, 276 Ky. 43, 122 S.W.2d 1012 (1938).

²³ *City of Cincinnati v. Cook*, 107 Ohio St. 223, 140 N.E. 655 (1923).

²⁴ *In re Application of 34th Street Ry.*, 102 N.Y. 343, 7 N.E. 172 (1886).

²⁵ E.g., *United States v. Dettra Flag Co.*, 87 F. Supp. 84 (E.D.Pa. 1949) (insignias). *Contra*, *State v. Holland*, 37 Mont. 393, 96 Pac. 719 (1908).

²⁶ *Ohio Motor Vehicle Dealer's and Salesmen's Licensing Bd v. Memphis Auto Sales*, 103 Ohio App. 347, 142 N.E.2d 268 (1957). See *Blumenthal v. Bd. of Medical Examiners*, 57 Cal. 2d 228, 368 P.2d 101 (1962), wherein the court held that a requirement of five years experience with a dispensing optician as a prerequisite for a license was a delegation of legislative power to the dispensing opticians.

²⁷ *In re O'Neill*, 41 Wash. 174, 83 Pac. 104 (1905). See *Allardt v. People*, 197 Ill. 501, 64 N.E. 533 (1902), wherein the court held that a law prohibiting the resale of tickets stamped "non-transferable" by the carrier was an invalid delegation to the carrier. *Contra*, *Samuelson v. State*, 116 Tenn. 470, 95 S.W. 1012 (1906). See also *Whaley v. State*, 168 Ala. 152, 52 So. 941 (1909), wherein the court upheld a law giving a carrier power to make "reasonable" rules regarding transfers. For these common carrier cases, see *Price v. Clawns*, 180 Md. 532, 25 A.2d 672 (1942); *State v. Corbett*, 57 Minn. 345, 59 N.W. 317 (1894); *Jannin v. State*, 51 S.W. 1126 (Tex. Crim. App. 1899).

injunction against it, thereby deciding whether the use of adjoining land is lawful. It can be said then that persons often have the option of rendering another's act lawful or unlawful, and courts which have held laws, allowing such an option, to be invalid as a "delegation of legislative power", seem to have overlooked this treatment. Thus, such courts are subject to the argument that it is the legislature which has laid down restrictions, to be imposed under certain circumstances, and the private person's act is just a "circumstance" which brings a situation under the law.

The courts which strike down the non-signer provision may be concerned with the plight of the retailer whose price is fixed. But most courts permit the legislature to fix prices, and the retailer is equally oppressed whether his price is subject to the whim of the legislature or of someone else. A few courts hold that all men are free to set their own price; the legislature is held to have practically no price-fixing power, and thus none to delegate. If the courts are interested in the retailer's freedom, they should adopt this position, rather than the pretext that the legislature has delegated its power to the manufacturer.

George Lincoln

FOREIGN CORPORATIONS—JURISDICTION—DEGREE OF BUSINESS ACTIVITY NECESSARY TO SUBJECT THE FOREIGN CORPORATION TO JURISDICTION

Defendant, a New Jersey corporation, sold a machine of special design to an Illinois partnership, which in turn loaned it to the plaintiff, a Georgia resident. In the contract of sale, the defendant expressly warranted that the machine would be capable of producing certain tubing. When it failed to function properly, the defendant undertook to repair it at the request of the plaintiff. In the course of this operation, defendant's representatives came into Georgia. Under their supervision, expenses in excess of \$11,000 were incurred, and plaintiff paid this amount. In the plaintiff's action for breach of warranty, based on doing business in Georgia, the defendant filed a plea to the jurisdiction of the court on the ground that the defendant corporation had not been doing business in the State of Georgia. The trial court entered judgment sustaining the plea and this holding was affirmed in the court of appeals which ruled that the defendant's activities did not constitute doing business in Georgia. *Lamex, Inc. v. Sterling Extruder Corporation*, 109 Ga. App. 92, 135 S.E.2d 445 (1964).